

IN RE WASTE TECHNOLOGIES INDUSTRIES

RCRA Appeal No. 93-11

ORDER DENYING REVIEW

Decided January 23, 1995

Syllabus

The City of Pittsburgh, Pennsylvania, challenges a decision by U.S. EPA Region V modifying the RCRA permit for the Waste Technologies Industries hazardous waste incinerator in East Liverpool, Ohio. The Region's decision resulted in the addition of Von Roll (Ohio), Inc. ("VRO") as an additional permittee authorized to operate the facility. The Region framed its permit action as a decision authorized under EPA regulations governing "Class 1" modifications of RCRA permits, and the Region urges us to uphold the decision on that basis. Pittsburgh, however, submitted comments challenging the Region's characterization of its proposed action as a Class 1 permit modification, and it continues to challenge that characterization in its appeal. Thus, although Pittsburgh's comments included no substantive objection to the addition of VRO as a facility operator, Pittsburgh argued in its comments—and continues to maintain on appeal—that the Region erred by effectuating that change through a Class 1 permit modification procedure.

More particularly, Pittsburgh contends that, because the facility owner allowed VRO to function as an operator before the permit was modified, and did not obtain prior EPA approval to do so, the Region's use of any kind of permit modification procedure to add VRO to the permit was unlawful. Pittsburgh contends that Region V was required, instead, to utilize the procedure of "revocation and reissuance" for purposes of adding VRO to the permit.

Held: The Board has jurisdiction to consider Pittsburgh's appeal despite the absence of any regulatory provision for administrative review of "Class 1" permit modification decisions. Although the appeal is cast in the form of a challenge to a Class 1 permit modification, the substance of Pittsburgh's argument is that the Region erred by refusing to employ revocation and reissuance procedures in the circumstances of this case. The appeal thus challenges the Region's denial of a request for revocation and reissuance of a RCRA permit, and such a denial is appealable to the Environmental Appeals Board pursuant to 40 C.F.R. § 124.5.

On the merits, Pittsburgh's challenge to the Region's permit action is rejected because the challenge is based on an erroneous reading of 40 C.F.R. § 270.40(a), governing RCRA permit "transfers." Pittsburgh reads the regulation to authorize the addition of a new permittee to an existing RCRA permit only by means of (1) a preapproved, permittee-requested modification of the permit, or (2) revocation and reissuance of the permit; in the absence of preapproval, Pittsburgh asserts, revocation and reissuance is the only permissible option. The Board concludes, however, that 40 C.F.R. § 270.40(a) also contemplates a third alternative method of adding a new permittee to an existing RCRA permit: through a non-